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In The
Supreme Court of The United States
October Term 1997

ALEX CAMPOS, et al.
Petitioners,

v.

TICKETMASTER CORPORATION
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Eighth Circuit

REPLY TO BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

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This brief is submitted in response to the Brief For The United States And The Federal Trade Commission As *Amici Curiae* ("U.S. Br.")

I.

UNDER THE COMPLAINT'S CONTROLLING ALLEGATIONS, PETITIONERS PURCHASED SUPRACOMPETITIVELY PRICED DISTRIBUTION SERVICES DIRECTLY FROM TICKETMASTER

It is hornbook law that the plaintiff's factual allegations control on a motion to dismiss, and that the plaintiff is entitled to all favorable inferences that may be drawn from the complaint. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). However, in its first Question Presented and throughout its brief, the United States posits a very different rule: according to the United States, *Illinois Brick* bars the petitioners' claims here based on "the [Eighth Circuit's] reading of the complaint . . . ." The United States is even more explicit in its disregard of well-established rules of pleading when it asserts that "the facts alleged in the complaint, *as interpreted by the courts below*, compel the conclusion that Ticketmaster sells its ticket distribution services directly to venues, and only indirectly to ticket buyers such as petitioners." U.S. Br. at 5 (emphasis added).

The test for the sufficiency of an antitrust complaint cannot be whether the facts alleged can be "interpreted" in a manner that turns them on their head. In Plaintiffs' complaint

– as in the real world – Ticketmaster sells its distribution services *directly* to consumers, along with the tickets.[1] (*See* Apdx. C at 45, 53-54; Complaint, ¶¶ 1, 31-33). This service fee is separately itemized by Ticketmaster in its sales to Plaintiffs, and Plaintiffs pay the full amount of this fee to Ticketmaster. (*Id* at 45, 54, ¶¶ 2, 32.) No amount of "interpretation" or sophistry can change the relationship between Plaintiff-consumers and Ticketmaster.

Moreover, Ticketmaster sells nothing to venues. Rather, Ticketmaster *pays* venues part of its monopoly proceeds. (Apdx. C at 75-76, ¶¶ 110-111.)[2] Because Ticketmaster pays the venues, it clearly *buys* the right to collect its hefty service charges.[3] Once again, no amount of verbal acrobatics can convert the venues into purchasers.

Because Plaintiffs buy services directly from Ticketmaster, there is no overcharge for Ticketmaster to "pass on" to Plaintiffs. Therefore, the concerns of *Illinois Brick* – the likelihood of duplicative recovery and the difficulty of apportioning damages – do not come into play here.

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[1] Webster's New World Dictionary (3d College Ed. 1988) defines "sell" as "to give up, deliver or exchange (property, goods, services, etc.) for money or its equivalent." Under this definition – or any other – Ticketmaster sells services to Plaintiffs.

[2] This last fact may well explain why venues are not lining up to sue Ticketmaster.

[3] According to the Eighth Circuit and the United States, that sort of "antecedent transaction" is sufficient to invoke the bar of *Illinois Brick* even for plaintiffs who purchase from a monopolist. As Petitioners have pointed out, *all* monopolist engage in any number of "antecedent transactions" in order to obtain and maintain their monopolies. Accordingly, the Eighth Circuit's decision provides blanket immunity for monopolists.

Tellingly, while the United States quotes the relevant language from *Illinois Brick*, it does not even attempt to assert how the venues could possibly recover damages that are duplicative of Plaintiffs' damages. *See* U.S. Br. at 12. That is because the Plaintiffs alone pay the *entire* amount of Ticketmaster's monopoly overcharges, so there will be no difficulty in apportioning those damages. Nor is there a potential for duplicative damages. Even assuming that the co-conspiring venues might have suffered damages, those damages would be different in kind from those suffered by Plaintiffs, and might, for example, include lost volume in ticket sales (of which venues receive a percentage) and of concession sales. The Plaintiffs' damages – the monopoly overcharges – are unique.

Illinois Brick therefore provides no justification for the Eighth Circuit's decision. Rather, at the heart of the Eighth Circuit's decision is the assumption that, "because the amount that ticket buyers pay for tickets (including amounts denominated as service fees) is 'a price that the market will bear,' a venue could charge that amount even if Ticketmaster extracted no supracompetive fees." U.S. Br. at 11, n.8 (quoting Apdx. A at 15). According to the Eighth Circuit, then, no consumers are *ever* harmed by monopolists since the consumers will always pay the "going rate."

But this Court has refused to dismiss antitrust complaints based on such unproven economic assumptions. Indeed:

> "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'"

Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 466-67 (1992) (quoting *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 579 (1925). Here – before Plaintiffs have even had a chance to develop the factual record – the Eighth Circuit's reliance on untested market assumptions was particularly unwarranted.[4]

Finally, the United States is unsuccessful in its attempt to limit the Eighth Circuit's "antecedent transaction" rule based upon the United States' "understanding" of the "context" of the rule. U.S. Br. at 13-15. Regardless of whatever peculiar insight the Solicitor General may have into the meaning of the Eighth Circuit's opinion, other courts can and will take the decision at its word. If a ski resort company had an exclusive contract with the forest service, and then charged monopoly prices to skiers, the "antecedent transaction" with the forest service may well prevent

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[4] Like the Eighth Circuit did here, Kodak asserted that its alleged monopoly could not have harmed consumers, since "If Kodak raised its parts or service prices above competitive levels, potential consumers would simply stop buying Kodak equipment." *Eastman Kodak*, 540 U.S. at 470. This Court rejected the argument, noting that "[t]he sales of even a monopolist are reduced when it sells goods at a monopoly price, but the higher price more than compensates for the loss in sales." *Id.*

consumer recovery. When travel agents start charging consumers for their services, and then engage in price fixing to increase those fees, the "antecedent transactions" rule may, again, prevent consumer recovery. Likewise, when licensees pay patent license fees, and then price fix the licensed product, the "antecedent transaction" rule could, again, prevent consumer recovery.

The "antecedent transaction" rule, together with the creative "interpretation" (*i.e.* re-pleading) of an antitrust complaint can bring virtually any case within the "antecedent transaction" rule, and therefore within the rule of *Illinois Brick*. This Court has never authorized such an unprincipled expansion of *Illinois Brick*. The Eighth Circuit's pernicious ruling should not be allowed to stand and take root.

II.

THE SOLICITOR GENERAL MISCHARACTERIZES THE NATURE OF THE SPLIT AMONGST THE CIRCUITS CONCERNING THE CO-CONSPIRATOR EXCEPTION TO *ILLINOIS BRICK*

As Petitioners have already pointed out, the Seventh and Ninth Circuits believe *Illinois Brick* does not mandate that a plaintiff name all the alleged co-conspirators in order to maintain suit as long as the plaintiff purchased overpriced goods or services directly from the antitrust violator. *See* Petitioners' Br. at 21-22 (collecting cases on both sides of the issue). The Eighth Circuit recognized the split when it stated

that "*In this circuit*," a plaintiff was required to join all of the alleged co-conspirators as defendants in order to avoid the bar of *Illinois Brick*. (Apdx. A at 13, n.4) (emphasis added). Curiously, the Solicitor General leaves out the highlighted language in Eighth Circuit's opinion, and claims there is no split amongst the circuits. U.S. Br. at 15-16.

The Petitioners submit that the Seventh and Ninth Circuits are correct. *See* Petitioners' Br. at 21-24. The United States and the Eighth Circuit have elevated the extremely remote possibility of duplicative recovery over the concern for strong enforcement of the antitrust laws that is at the heart of the *Illinois Brick* and of all this Court's antitrust jurisprudence. The requirement that a plaintiff name all co-conspirators means that the private-party treble damages action that Congress created to ensure vigorous enforcement of antitrust laws will be unavailable when a nationwide monopolist conspires with local entities.[5] This result is particularly unfortunate where, as here, the United States has already *dropped* its investigation of Ticketmaster. *See* U.S. Br. at 2, n.2. The result of the Eighth Circuit's ruling may well mean that – even though no one disputes that Plaintiffs have alleged massive antitrust violations – no adequate deterrent will prevent Ticketmaster from continuing its unlawful practices.

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[5] Local entities, such as venues, could only be sued in their own localities. Thus, unless private plaintiffs had unlimited resources and could file cases all over the country, the very worst sort of monopolists will go undeterred.